92-

No. _____

Supreme Court, U.S.
FILED
JAN 19 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

J. PAUL FORD, WARDEN,

Petitioner,

v.

HENRY HAMILTON,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

PAULA K. SMITH
Assistant
Attorney General
Counsel of Record
for Petitioner

MICHAEL J. BOWERS
Attorney General

SUSAN V. BOLEYN
Senior Assistant
Attorney General

Please serve:

PAULA K. SMITH
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3351

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I.

How does a reviewing court determine whether a state trial judge "improperly required" joint representation by counsel of multiple defendants over objection at trial so that a defendant's Sixth Amendment right to the assistance of counsel was violated?

II.

Should this Court apply the actual conflict/adverse impact test for assessing conflicts of interest in joint representation cases to determine whether a Sixth Amendment violation occurred?

III.

May a federal habeas corpus court, when conditionally granting relief, commence the running of any retrial period afforded the state from the date the opinion is issued, – i.e., before the case is final and the mandate has issued?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. THIS COURT SHOULD GRANT CERTIORARI TO FORMULATE A TEST FOR DETERMINING WHETHER JOINT REPRESENTATION WAS "IMPROPERLY REQUIRED" OVER TIMELY OBJECTION AT TRIAL 5

II. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT THE ACTUAL CONFLICT/ ADVERSE IMPACT TEST SHOULD BE APPLIED TO POTENTIAL CONFLICT OF INTEREST CLAIMS TO DETERMINE IF JOINT REPRESENTATION WAS "IMPROPERLY REQUIRED." 9

III. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT A FEDERAL HABEAS CORPUS COURT, WHEN GRANTING RELIEF, SHOULD COMMENCE THE RUNNING OF ANY RETRIAL PERIOD WITH THE ISSUANCE OF THE MANDATE 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Brady v. Maryland, 373 U.S. 83 (1963) 8

Burger v. Kemp, 483 U.S. 776 (1987) 11

Cuyler v. Sullivan, 446 U.S. 335 (1980) 9, 10, 11, 12

Fortson v. Burden, No. 90-8022 (11th Cir. appeal dismissed July 13, 1990) 4

Fretwell v. Lockhart, 946 F.2d 571 (8th Cir. 1991) 13

Glasser v. United States, 315 U.S. 60 (1942) 8, 10

Hamilton v. State, 255 Ga. 468, 339 S.E.2d 707 (1986) 3

Holloway v. Arkansas, 435 U.S. 475 (1978) 5, 9, 10, 11, 12

Lockhart v. Fretwell, No. 91-1393 (U.S., argued Nov. 3, 1992) 13, 14

Mahler v. Eby, 264 U.S. 32 (1924) 13

Strickland v. Washington, 466 U.S. 668 (1984) 11, 12

Wheat v. United States, 486 U.S. 153 (1988) 9

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 2

O.C.G.A. § 24-3-5 8

No. _____

In The

Supreme Court of the United States

October Term, 1992

J. PAUL FORD, WARDEN,

Petitioner,

v.

HENRY HAMILTON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Warden J. Paul Ford, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on August 21, 1992, and the denial of the request for rehearing on October 21, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 969 F.2d 1006, and is reprinted in the Appendix hereto, App. 1, *infra.*

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on August 21, 1992, and the request for rehearing denied on October 21, 1992.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Respondent Henry Hamilton was jointly indicted with Michael Fortson on July 12, 1983, by the Fulton County, Georgia, grand jury for the May 28, 1983, malice murder of Stephen L. Hynes and two counts of criminal attempt to commit armed robbery upon Mr. Hynes and Catherine Moore. At a joint jury trial beginning November 14, 1983, where Respondent and his codefendant were represented by the same counsel, both defendants were found guilty of felony murder. Both defendants received sentences of life imprisonment.

Although represented by new, separate counsel, Respondent and his co-defendant filed a joint appeal to

the Supreme Court of Georgia, asserting among other issues that their trial counsel labored under an actual conflict of interest. The Supreme Court of Georgia applied the actual conflict/adverse impact test to the conflict claim and found this, as well as the other issues, lacked merit and affirmed the convictions and sentences of both defendants. *Hamilton v. State*, 255 Ga. 468, 339 S.E.2d 707 (1986).

Through direct appeal counsel, on March 13, 1989, Respondent filed a petition for a writ of habeas corpus in the United States District Court, Northern District of Georgia, Atlanta Division. Respondent raised issues exhausted in his direct appeal. An answer, brief and exhibits from the trial and direct appeal proceedings were submitted by Petitioner Ford (hereinafter the Warden).

On August 24, 1989, the magistrate judge entered his report and recommendation, denying Respondent's motion for a federal evidentiary hearing and recommending that relief be denied. In denying relief on the conflict of interest claim, the court applied the actual conflict/adverse impact test to find it lacked merit. Respondent filed objections through counsel.

On November 15, 1989, the district court adopted the report and recommendation. Judgment was entered in favor of the Warden on that same date.

On December 26, 1989, counsel for Respondent filed a motion for certificate of probable cause, an application for certificate of appeal to proceed in forma pauperis, a motion to proceed in forma pauperis, and a motion for appointment of counsel. On January 11, 1990, the district

court granted a certificate of probable cause and pauper's status but denied the motion for appointment of counsel.

On February 5, 1990, the district court clerk entered on the docket a notice of appeal in Respondent's case. The clerk made an entry that the clerk had treated the case as though a notice of appeal had been filed.

On April 2, 1990, the United States Court of Appeals for the Eleventh Circuit denied Respondent's motion for appointment of counsel. On April 3, 1990, Respondent's appeal was consolidated with the appeal of his co-defendant whose case had proceeded jointly through the federal district court on a habeas corpus petition raising the same conflict issue as in Respondent's case. *Fortson v. Burden*, No. 90-8022 (11th Cir. appeal dismissed July 13, 1990). The co-defendant's appeal was dismissed for want of prosecution.

Following the initial submission of briefs on behalf of the parties, the Eleventh Circuit appointed counsel to represent Respondent. Supplemental briefs were filed. Oral argument was had before a panel of the court on June 25, 1992.

On August 21, 1992, the panel issued its opinion, finding that, because Respondent had raised a timely objection at trial to joint representation and the trial court did not conduct "adequate inquiry" into the potential conflict of interest, reversal was automatic. (App. 1-16). The panel directed that the writ of habeas corpus issue within 90 days from the date of the opinion unless the state had commenced retrial proceedings. (App. 16).

The Warden's timely petition for rehearing and/or suggestion of rehearing en banc was denied on October 21, 1992. (App. 17-18). The Warden also filed a motion to stay the running of the retrial period, but the court did not rule upon that motion. However, on December 10, 1992, the court granted the Warden's motion to stay issuance of the mandate up to and including January 20, 1993.

With regard to the underlying offenses, the Warden adopts the statement of facts set forth by the Georgia Supreme Court in its direct appeal opinion. (App. 2, n.1).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO FORMULATE A TEST FOR DETERMINING WHETHER JOINT REPRESENTATION WAS "IMPROPERLY REQUIRED" OVER OBJECTION.

This Court has never promulgated a test for determining when a trial court "improperly requires joint representation over timely objection" to warrant automatic reversal. *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978). The Warden urges this Court to grant certiorari to formulate just such a test for reviewing the actions of trial judges.

The need for such a test is readily evidenced by this case as the trial court did not ignore the assertions of conflict but ascertained that the lawyer would not be representing competing interests as the defendants planned to offer separate alibi defenses. Yet, the panel below concluded the trial court's inquiry was inadequate

through substituting its own credibility findings for those of the trial judge, who had been in the best position to assess the demeanor of trial counsel, and also misstating facts.

Here, Respondent never raised any objection to joint representation until the morning of his November 14, 1983, trial. Counsel for the defendants, who had been representing both of them since July, announced "not ready" when the case was called because the defense had "a number of motions," including one for a continuance. (Trial Record, p. 8; Trial Transcript, p. 3) (the latter hereinafter designated T.) Counsel then asserted that the "defendants should have separate counsel" since the motion for severance had been denied previously and that if they were tried together, counsel could not "adequately defend one without, in the eyes of the jury, seemingly to, at least by default, admit the guilt of the other." (T. 9). Counsel reasserted the previously denied motion for severance or alternatively requested separate counsel. *Id.* The trial court asked counsel for his reasons, and counsel stated he did not "want to be specific." *Id.* The trial court replied, "That's what I thought." *Id.* The court further noted that it had spent the preceding weekend reading "almost every word that was in this box which was the state's file, at your request" as part of the in camera inspection; based upon that information the trial court did not "see any reason why these defendants shouldn't be tried together based upon what I have read in the state's file." (T. 9-10). The court and defense counsel discussed the possibility of a public defender being appointed, but defense counsel stated another lawyer could not possibly be ready to go forward. (T. 10-11).

The prosecutor noted that at a prior pre-trial hearing (which was never transcribed or made part of the record on direct appeal), the prosecutor had sua sponte raised the joint representation issue and the defendants had understood the ramifications of and elected to proceed with joint representation. (T. 11). Defense counsel did not contradict these assertions. *Id.* However, defense counsel asserted that information he had gleaned over the week-end warranted separate counsel on the basis that "the defense of one will necessarily seem in the minds of the jury to be giving up on the other man's innocence and I certainly don't concede that." (T. 13). The trial court ascertained that the defense planned to present separate alibi defenses. (T. 13-14). The court further noted that there had been "a program since July" that whenever it seemed the court had ruled on all pending motions, the defense filed new ones the next day, noting in particular the dilatory nature of a motion filed on November 9th requesting transcription of an October 17th pretrial motions hearing. (T. 16).

Discussions then centered on whether the court's in camera inspection of the state's file had yielded any exculpatory matters (T. 18-52), during which the defense again requested a continuance (T. 39). When counsel again requested a continuance to interview witnesses, the trial court noted counsel had been in the case since July, the court had been lenient in postponing arraignments and allowing additional time for motions, counsel was "still arguing the same thing," and the court "firmly believe[d]" that counsel was aware of the evidence the state would introduce as similar transactions and who generally would be called as witnesses. (T. 58-59). When

these and other motions failed, counsel again requested separate counsel and again renewed the continuance request. (T. 61-62). Thus, while there was only an explicit ruling denying these last two motions (T. 62), it is clear from the tenor of the entire colloquy on defense counsel's motions that the trial court viewed them as a stalling tactic.

The panel relied upon selected portions of the colloquy on all defense motions to view the trial court as curtailing inquiry into the assertions of conflict. The court misstated the record or misconstrued its significance. For example, the panel treated the in camera inspection as a mere perusal of the "trial file" and ignored the fact the trial court was discharging its duty to uncover exculpatory evidence in the state's file the defense requested under *Brady v. Maryland*, 373 U.S. 83 (1963). (App. 14-15). The panel also found, for example, that the defense allegedly renewed the conflict motion after Calvin Fletcher testified that, while visiting co-defendant Fortson's niece, Fortson told Fletcher Respondent shot the victim. (App. 14, n.5). The record shows no such request. (T. 768).

Most significantly, the panel assumed Fletcher's testimony was not objected to because of the alleged conflict and the testimony was otherwise inadmissible against Respondent. (App. 15, n. 6). This is erroneous because, under Georgia's conspiracy statute which permits declarations of co-conspirators made during the concealment phase of the crime to be admitted, this statement would have been admitted against Respondent even if he had had separate counsel to object or a separate trial had been ordered. *See* O.C.G.A. § 24-3-5. This is not the same scenario as *Glasser v. United States*, 315 U.S. 60, 74-75

(1942), where the lack of objection resulted in the questionable admission of a co-conspirator's testimony.

Thus, without a test for determining whether joint representation was "improperly required" by a state trial court, a reviewing court is free to rule that a trial court's actions were inadequate, even where the record reveals no reasonable basis upon which to "presume that the possibility for conflict has resulted in ineffective assistance of counsel." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). It is state trial courts who are most vulnerable to being "whip-sawed" by *Holloway* as federal courts now have the benefit of Federal Rule of Criminal Procedure 44(c) for guidance in multiple representation situations. *Wheat v. United States*, 486 U.S. 153, 160-61 (1988). Even where a trial court's inquiry reveals that counsel is not simultaneously representing competing interests and the assertions of conflict appear pro forma or dilatory, given *Holloway's* rule of automatic reversal but lack of guidance in its application, a cautious trial judge would be afraid not to yield. For these reasons, the Warden urges this Court to grant certiorari on this question.

II. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT THE ACTUAL CONFLICT/ADVERSE IMPACT TEST SHOULD BE APPLIED TO DETERMINE IF JOINT REPRESENTATION WAS "IMPROPERLY REQUIRED."

The Warden urges this Court to grant certiorari to hold that, in light of *Cuyler v. Sullivan* there should no longer be a different test for assessing potential conflict of interest claims raised by defendants who do object at trial

to joint representation and those who do not. The panel in this case held that the *Cuyler* actual conflict/adverse impact test is limited to cases where no objection was raised by the defendants at trial to joint representation. Instead, the panel relied upon *Holloway v. Arkansas* to conclude that the trial judge in this case, when confronted on the morning of trial with assertions of conflict in addition to other dilatory motions, did not make "sufficient" inquiry into the conflict and found that reversal was automatic.

In *Holloway v. Arkansas,* this Court held that joint representation is not per se violative of the Constitution. 435 U.S. at 482. Nevertheless, this Court found that the trial judge, who was faced with repeated objections, motions and assertions of conflict of interest by trial counsel who jointly represented three co-defendants, "failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." *Id.* at 484.

Holloway's rule of automatic reversal apparently stems from the "assumption" that *Glasser v. United States,* 315 U.S. 60 (1942), "requires reversal, even in the absence of a showing of specific prejudice to the complaining codefendant, whenever a trial court *improperly permits or requires* joint representation." *Holloway,* 435 U.S. at 487. (Emphasis supplied).

In *Cuyler v. Sullivan,* this Court addressed two issues left open by *Holloway,* these being whether a state trial judge must inquire sua sponte into joint representation and whether the "mere possibility" of a conflict of interest is sufficient to result in a Sixth Amendment violation

of the right to counsel. 446 U.S. at 345. This Court construed *Holloway* as requiring "state trial courts to investigate timely objections to multiple representation," 446 U.S. at 346, but declined to read *Holloway* as placing a duty upon trial courts to initiate inquiry into joint representation. This Court also formulated, apparently for the first time, a test for determining what constitutes a conflict of interest:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.

Cuyler, 446 U.S. at 348.

Subsequently, in *Strickland v. Washington,* 466 U.S. 668, 692 (1984), this Court discussed situations in which prejudice would be presumed when counsel was actually or constructively denied the defendant and noted that conflict of interest cases warrant a "similar, though more limited presumption of prejudice." In a conflict situation, "prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Strickland,* 466 U.S. at 692, *quoting Cuyler,* 446 U.S. at 348. *Strickland* made no reference to whether *Cuyler's* actual conflict/adverse impact was triggered by a lack of objection at trial.

Similarly, *Burger v. Kemp,* 483 U.S. 776, 783 (1987), applied the *Cuyler* test in a death penalty trial without reference to whether the defendant had objected at trial. In *Burger* itself, there was no joint trial of defendants;

instead, the claim was that two law partners appointed to represent the two co-defendants at separate trials constituted joint representation.

At the time *Holloway* was decided, this Court had not promulgated a test for resolving conflict of interest claims. Indeed, in *Holloway*, this Court never determined whether an actual conflict of interest was present but "simply held that the trial court's error unconstitutionally endangered the right to counsel." *Cuyler*, 446 U.S. at 345. This Court had also not yet identified the parameters of when prejudice would be presumed under the Sixth Amendment, as subsequently made clear in *Strickland v. Washington*. However, given these subsequent Sixth Amendment developments, it is no longer clear whether *Cuyler* applies solely to "no objection" cases or whether its "no objection" language is merely dicta.

Given the fact that this Court now has a conflict of interest test and trial courts are aware of *Holloway's* directive to inquire into assertions of conflict, there no longer seems a reason to distinguish between potential conflict of interest claims raised by defendants who timely object and those who do not. This Court is still examining whether there was an impermissible infringement of the right to the assistance of counsel. That a defendant timely objects may be weighty proof of a possible conflict, but it should not be dispositive of the issue. A trial court must still determine if counsel may be simultaneously representing competing interests. For these reasons, the Warden would urge this Court to grant certiorari to resolve this unanswered question.

III. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT A FEDERAL HABEAS CORPUS COURT, WHEN GRANTING RELIEF, SHOULD COMMENCE THE RUNNING OF ANY RETRIAL PERIOD WITH THE ISSUANCE OF THE MANDATE.

Finally, in granting habeas corpus relief, the panel ordered that the "writ shall issue unless, *within 90 days from the date of this opinion,* the state has commenced proceedings to retry the [Respondent]." (App. 16). (Emphasis added). Such a provision appears to be an attempt to thwart "the state" through its representative from seeking further review of the decision to grant relief. Such a provision places the state in a "catch-22" in that, if the state begins the retrial, attempts for review of the decision to grant relief may be viewed as moot. Yet, if such a provision is permitted to stand, the state risks litigation on its ability to retry the defendant at all.

The Warden notes that in *Lockhart v. Fretwell,* No. 91-1393 (U.S., argued Nov. 3, 1992), this Court is examining the scope of what remedies may be ordered by a federal habeas court in granting relief. In that case, the district court had granted relief and ordered the state to conduct a resentencing trial within 90 days or a life sentence would be imposed, and the state was forced to seek a temporary stay of this order. *Fretwell v. Lockhart,* 946 F.2d 571, 573 (8th Cir. 1991).

It has been customary for federal habeas corpus courts to delay the petitioner's release, if relief were granted, to allow the state time to correct any defect on its custody. *Mahler v. Eby,* 264 U.S. 32 (1924). However, this practice should not be used as a tool to discourage

the state from seeking further review of a decision with which it disagrees. Given the procedures governing the issuance of the mandate, the Warden urges this Court to grant certiorari in light of *Fretwell* to hold that any retrial period should commence when the decision granting relief is final and the mandate issues.

CONCLUSION

WHEREFORE, for all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals as the decision presents questions of paramount importance not previously decided by this Court.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

SUSAN V. BOLEYN
Senior Assistant
Attorney General

PAULA K. SMITH
Assistant Attorney
General

Please serve:

PAULA K. SMITH
132 State Judicial
Building
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-3351

HAMILTON v. FORD

Henry HAMILTON, Petitoner-Appellant,

v.

Paul FORD, Warden, Jack T. Rutledge Correctional Institute, Respondent-Appellee

No. 90-8023.

United States Court of Appeals,
Eleventh Circuit.

Aug. 21, 1992.

Before BIRCH, Circuit Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

BOWNES, Senior Circuit Judge.

This is an appeal from a denial of a writ of habeas corpus from the United States District Court for the Northern District of Georgia. Petitioner Henry Hamilton claims ineffective assistance of counsel as well various trial errors. Because we find that petitioner received ineffective assistance of counsel, we conditionally grant petitioner's writ.

Background

Hamilton was arrested and subsequently indicted in Georgia state court for the murder of Stephen Hynes,

---

* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

which occurred on May 28, 1983. Hynes was murdered during an attempted robbery.[1] The indictment charged petitioner and co-defendant Michael Fortson with one count of malice murder and two counts of attempted

---

[1] The Supreme Court of Georgia on direct review of Hamilton's appeal found the following facts:

> On the evening of May 28, 1983, the victim and his fiancee, Catherine Moore, were preparing to have dinner on the sidewalk outside her apartment door which she used as a patio, the couple having been talking and drinking beer and champagne there for about 45 minutes. Catherine testified that, when she heard a "soft creeping sound," she turned to see a male crouching down with a silver revolver, who stated, "Don't look at me; don't look at me." He then said, "You can come on down, buddy," whereupon a second male emerged from the bushes in a few seconds. Stephen and Catherine stood up when the armed intruder gave instructions that "we are going to enter the apartment now." Stephen held Catherine's arm, and they ran for about 10 yards, at which time two or three gunshots were fired, and they both fell. Catherine testified that she got up and, when she looked back, saw the assailant shoot her fiance who was facing him.
>
> There was evidence that appellant Fortson sustained gunshot injuries to his leg, which he explained to a witness as having happened accidentally while appellant Hamilton was shooting victim Hynes. Expert testimony confirmed other evidence that the victim was killed by a .38 caliber bullet entering the chest from the rear. Another bullet recovered from the victim's body was also a .38 caliber, but had been fired from a different revolver. Identification of the appellants as the assailants was made by Miss Moore from a police lineup, as well as from a hat and samples of hair, blood and saliva from the crime scene.

Hamilton v. State, 255 Ga. 468, 468-69, 339 S.E.2d 707 (1986).

robbery of Hynes and his fiance [sic], Catherine Moore. The indictment listed twenty-three witnesses.

Both Hamilton and Fortson, Hamilton's cousin, were represented during pretrial motions by one attorney. On September 13, 1983, counsel moved to sever the trials of the two co-defendants. Defense counsel also filed several motions to obtain the evidence against his clients. These motions included a request for a copy of the indictment, a request for a list of witnesses, a request to compel discovery, and a request for a commitment hearing.

During a pretrial hearing on October 17, 1983, the court denied defendants' motion for severance. It also ordered the prosecution to provide the defense with a list of witnesses and their addresses, setting a deadline of October 28. Finally, the court set a date of November 14 as the first day of trial. In a letter dated October 21, the prosecutor produced a list of 144 potential witnesses with incomplete addresses. The weekend prior to trial, the prosecution provided the defense with a list of a witnesses who would actually testify at trial.

On November 14, 1983, the first day of trial, defense counsel renewed his request for severance, or in the alternative, appointment of separate counsel to represent one of the defendants. Counsel explained that investigation over the preceding weekend had led him to believe that he could not effectively represent both defendants because they had conflicting interests. The prosecutor objected, noting that in a previous pretrial hearing the defendants had indicated that they understood the ramifications of joint representation.

Defendants' counsel replied that when defendants allegedly consented to joint representation three moths prior to trial, it was unclear what the ramifications of joint representation would be. He observed that new information had been discovered up to and including the weekend prior to trial. He further added that he believed that it would be a miscarriage of justice for the men to be jointly represented. The court asked counsel whether the defense would consist of placing defendants in different places at the same time. Counsel answered in the affirmative. The court then commented that "it gets kind of complicated for a trial judge when he is charged with the efficiency of his office as well as the sanctity of his office." Counsel then repeated that the motion for separate counsel was not intended as a delaying tactic. The court denied the motion of severance and for separate counsel and the case went to trial.

The bulk of the evidence at trial consisted of Moore's testimony and that of several victims of "similar transactions" – involving armed robberies. Moore was able to identify both Hamilton and Fortson as being involved in the murder of Hynes, although she did not testify as to whether both or only one actually shot her fiance. The various victims of "similar transactions," with varying degrees of certainty, identified one or both of the defendants as having robbed them. Though the trial court termed these robberies "similar transactions," the testimony indicated that in some of the robberies only one individual was involved.

The prosecution also placed into the evidence the testimony of Calvin Fletcher, Gwendolyn Cates, and James Tate. Fletcher testified that at a party defendant

Fortson told him that Hamilton had shot Hynes and in the process had accidentally shot him as well. No objection was made during the testimony. Cates testified that she was at the same party and saw Michael's injured leg. She also attempted to testify to the effect that Yolanda Cudger, Fortson's niece, had stated that Fortson was injured as a result of the Hynes killing. Defense counsel objected on grounds of hearsay and the objection was sustained. Finally, Tate also testified as being present at the party and observing Fortson's injury. He, too, testified that Cudger had explained that Fortson's injury had been the result of the attempted robbery of Hynes.

After the testimony of Fletcher, Cates, and Tate, defendants' counsel renewed his motion for separate counsel. He explained that to represent Hamilton properly, he needed to cross-examine Fortson about the testimony of the three witnesses but could not properly do so because Fortson was his client as well. The court again denied the motion after the prosecutor asserted that defendants had waived their right to conflict-free representation. The court did require, however, that counsel from the public defender's office sit in on the case and advise the defendants in the event that independent cross-examination was necessary.

Defendants' theory of the case mainly consisted of alibi testimony. Both defendants testified on their own behalf. Fortson denied stating that he had received his leg wounds during the attempted robbery as testified by Fletcher. He explained that he had received them in a disagreement over a craps game the night before the robbery. Fortson testified that he was at his girlfriend's home the night of the robbery. Hamilton also denied

involvement in the murder and stated that he was at his girlfriend's home at the time of the murder.

Both Hamilton and Fortson were convicted of felony murder and armed robbery and sentenced to life imprisonment on November 28, 1983. The Georgia Supreme Court affirmed their convictions on appeal. Finding no actual conflict of interest, the court held that both defendants received effective assistance of counsel. It also held that such a claim "may not be raised for the first time on direct appeal." *Hamilton v. State*, 255 Ga. 468, 470, 339 S.E.2d 707 (1986).

On March 13, 1989, Hamilton filed a writ of habeas corpus in the District Court for the Northern District of Georgia pursuant to 28 U.S.C. § 2254. In his report and recommendation, the magistrate found that Hamilton had received effective assistance of counsel because he failed to demonstrate specific instances in the record where a conflict had occurred or where he had been prejudiced by that conflict. The district court adopted the report and recommendation on November 27, 1989, and denied the petition.

On December 26, 1989, Hamilton filed an application for a certificate of probable cause to appeal the denial of his petition for writ of habeas corpus. He further filed a motion for leave to file *in forma pauperis* and for appointment of counsel pursuant to the Criminal Justice Act. *See* 18 U.S.C. § 3006A. His motions for a certificate of probable cause and to file *in forma pauperis* were granted but his motion for appointed counsel was denied. Hamilton proceeded *pro se*, filing a formal notice of appeal on February 5, 1990. Following submission of the initial set of briefs

we appointed counsel to represent Hamilton and both sides filed supplemental briefs.

Analysis

Although Hamilton raises five issues on appeal, we need only address one issue; whether Hamilton received effective assistance of counsel. Hamilton contends that by requiring him to proceed over the timely objection of counsel with a lawyer representing both himself and Fortson, he was automatically denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments.

The state argues that the district court properly found that Hamilton had failed to establish an actual conflict of interest and adverse impact on counsel's representation. The state asserts that Hamilton thereby failed to prove ineffective assistance of counsel.[2]

A. *Standard of Review*

In reviewing a petition filed under 28 U.S.C. § 2254, we presume that factual findings made by a state court

---

[2] We reject the state's contention that we lack appellate jurisdiction over this case because of Hamilton's failure to file a formal notice of appeal within the thirty days as required by Federal Rule of Appellate Procedure 4(a). Hamilton did file a motion for a certificate of probable cause and a motion to file *in forma pauperis* within the thirty days. We have held that such a filing "substantially complies with the notice of appeal requirements, and therefore, is the equivalent of filing a proper notice of appeal." *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467, 1472, (11th Cir.1984).

are correct.[3] *See Sumner v. Mata*, 449 U.S. 539, 546, 101 S.Ct. 764, 768, 66 L.Ed.2d 722 (1981). We review factual conclusions made by the district court under the clearly erroneous standard. *See* Fed.R.Civ.P. 52(a); *see also Amadeo v. Zant*, 486 U.S. 214, 223, 108 S.Ct. 1771, 1777, 100 L.Ed.2d 249 (1988). We review mixed questions of fact and law *de novo*. Whether Hamilton received ineffective assistance of counsel or waived any conflict of interest is a mixed question of fact and law with independent review by this court. *See Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980); *McConico v. Alabama*, 919 F.2d 1543, 1545 (11th Cir.1990); *Oliver v. Wainwright*, 782 F.2d 1521, 1524 (11th Cir.), *cert. denied*, 479 U.S. 914, 107 S.Ct. 313, 93 L.Ed.2d 287 (1986).

B. *Joint Representation*

Hamilton argues that because his counsel timely objected to the joint representation, his right to effective assistance of counsel was violated *per se*. Relying on *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), he argues that he need not show either an actual conflict of interest or any adverse effects

---

[3] Section 2254(d) states in pertinent part:
In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State, or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct. . . .

on his counsel's performance from that conflict. Hamilton contends that once he timely objected to joint representation and the trial court failed to explore adequately his objection, his Sixth Amendment right was violated and reversal of his conviction is appropriate.

Relying on *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), the state contends that in order to obtain reversal of his conviction, Hamilton must demonstrate both an actual conflict of interest and that the conflict adversely affected his lawyer's performance. *Id.* at 348, 100 S.Ct. at 1718. The state argues that because Hamilton failed to demonstrate either an actual conflict or adverse impact, he received effective assistance of counsel.[4]

The Sixth Amendment guarantees criminal defendants effective assistance of counsel. *See Strickland v.*

---

[4] The state's brief on appeal intimates that Hamilton waived his right to conflict-free counsel. We find that such an argument, if intended, would be without merit. A defendant may only waive the right to conflict-free counsel if that waiver is knowing and intelligent. For a waiver "[t]o be knowing and intelligent the defendant must be told (1) that a conflict of interest exists; (2) the consequences to his defense from continuing with conflict-laden counsel; and (3) that he has a right to obtain other counsel." *Duncan v. Alabama*, 881 F.2d 1013, 1017 (11th Cir.1989).

There is no indication from the record that Hamilton was affirmatively informed prior to the first day of trial that there was a conflict of interest, of the consequences therefrom, and of his right to obtain alternate counsel. What is clear from the record is his vigorous objection to joint representation on the first day of trial when the conflict of interest became apparent. We therefore find no waiver of his right to conflict-free representation.

Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984); *Cuyler*, 446 U.S. at 345, 100 S.Ct. at 1716; *Duncan v. Alabama*, 881 F.2d 1013, 1016 (11th Cir. 1989). Part of effective assistance of counsel is the avoidance of conflicts of interest. The Supreme Court has emphasized that when counsel is burdened with a conflict of interest, she "breaches the duty of loyalty, perhaps the most basic of counsel's duties" and has therefore failed to provide effective assistance of counsel. *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067; *see also Buenoano v. Singletary*, 963 F.2d 1433, 1438 (11th Cir., 1992).

In *Strickland*, the Court held that in order to obtain a reversal of a conviction for ineffective assistance of counsel, a defendant must demonstrate both that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. at 2064. The Court also held, however, that "[i]n certain Sixth Amendment contexts, prejudice is presumed." *Id.* at 692, 104 S.Ct. at 2067. Where there is an issue of conflict of interest, the Court stated, "Prejudice is presumed only if the defendant demonstrates that counsel 'actually represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Id.* at 692, 104 S.Ct. at 2067 (quoting *Cuyler*, 446 U.S. at 305, 348, 100 S.Ct. at 1718 (footnote omitted)).

Cuyler is limited to those cases in which a defendant raises no objection to joint representation at trial. *Id.* at 348, 100 S.Ct. at 1718; *see also Duncan*, 881 F.2d at 1016 n. 5 ("The opinion in *Cuyler* is specifically limited to cases where the issue was not raised at trial."). The Court

stated that "a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial." *Cuyler*, 446 U.S. at 348, 100 S.Ct. at 1718. It assumed that if a defendant objects to joint representation, a trial court has a constitutional responsibility to determine whether an actual conflict exists. *Id.*

This judicial responsibility was established in *Holloway*. In *Holloway*, the trial court appointed one public defender to represent all three defendants accused of robbing and terrorizing five employees of a restaurant. Prior to trial the public defender asked the court to appoint separate counsel for each defendant because the " 'the [sic] defendants ha[d] stated to him that there is a possibility of a conflict of interest in each of their cases. . . . ' " 435 U.S. at 477, 98 S.Ct. at 1175. After holding a hearing the court refused to appoint separate counsel. All three were found guilty.

In reversing their convictions, the Court refused to resolve whether there was actually a conflict of interest. Instead, it held that the trial court erred by "fail[ing] either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." The Court found this failure to appoint separate counsel or to inquire adequately "deprived [defendants] of the guarantee of 'assistance of counsel.' " *Id.* at 484, 98 S.Ct. at 1179. It determined, therefore, that reversal of defendants' convictions was automatic. *Id.* at 488, 98 S.Ct. at 1180.

Previously we had left open the issue, "whether a defendant must satisfy the *Cuyler* standard to obtain

reversal of his conviction if the trial judge refused to inquire into the *possibility* of conflict after objection." *Duncan*, 881 F.2d at 1017 n. 5 (emphasis added) (citing *Holloway*). We now hold that when defendants make timely objections to joint representation, they need not show an actual conflict of interest when a trial court fails to inquire adequately into the basis of the objection. In such circumstances the trial court has failed to discharge its constitutional duty under *Holloway* to determine whether the defendants are receiving adequate assistance of counsel, a duty separate from the *Cuyler* framework. Reversal, therefore is automatic.

We do not depart from the established precedent of this circuit that in the absence of a timely objection. a defendant must demonstrate that there was an actual conflict of interest that adversely affected her attorney's performance. *See, e.g., Buenoano,* at 1438; *McConico v. Alabama,* 919 F.2d at 1545; *Zamora v. Dugger,* 834 F.2d 956, 960-61 (11th Cir.1987); *Lightbourne v. Dugger,* 829 F.2d 1012, 1023 (11th Cir.1987), *cert. denied,* 488 U.S. 934, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988); *Smith v. White,* 815 F.2d 1401, 1404 (11th Cir.), *cert. denied,* 484 U.S. 863, 108 S.Ct. 181, 98 L.Ed.2d 133 (1987). Rather, we hold that in the situation where there is both a timely objection *and* the trial court fails to appoint separate counsel *or* to inquire adequately into the possibility of a conflict of interest, the reversal will be automatic. *See United States v. Sutton,* 794 F.2d 1415, 1419 (9th Cir.1986) (finding Sixth Amendment violation requiring automatic reversal if "trial judge fails either to appoint separate counsel or to take adequate

steps to ascertain whether the risk is too remote to warrant individual representation"); *United States v. Cirrincione*, 780 F.2d 620, 625 (7th Cir.1985) (no automatic reversal unless a trial court fails to conduct an inquiry after a timely objection); *United States v. Punch*, 722 F.2d 146, 152 (5th Cir.1983) (same).

Applying this legal standard requires that we address two issues: (1) whether counsel's objection on the first day of trial was timely; and (2) if the objection was timely, whether the trial court adequately explored the possibility of conflict of interest.

1. Timeliness

After an examination of the record, we find that the objection was timely. Hamilton's counsel explained his delay:

> My investigation in this matter, your honor, which continued up until ten o'clock last night, convinces me that these defendants should have separate counsel. The court has previously denied our motion to sever and there are matters that will arise in the course of this trial if the men are tried together with the same counsel that will make it impossible for me to adequately defend one without, in the eyes of the jury, seeming to, at least by default admit the guilt of the other.

Record at 9. Counsel's investigation continued until the time of trial because he continued to receive information from the prosecution until the weekend prior to trial. We

find that any delay in counsel's objection to joint representation was caused by the prosecution's delay in providing evidence to the defense and/or the inadequacy of the information provided. Defense counsel received information from the prosecution only after repeated requests and motions.[5] Thus counsel objected to joint representation in as timely a manner as the circumstances allowed.

2. Adequate Inquiry by the Trial Court

We also find that the trial court inadequately inquired into the possibility of a conflict of interest. The court's inquiry consisted solely of commenting in a colloquy during the first day of trial that it doubted that defense counsel wished to elaborate how there was a conflict of interest. Defense counsel did not respond because the comment was made in open court. The court then stated that it had read the trial file in relation to an unrelated motion and did not see how a conflict of interest could arise. No further inquiry was made.

---

[5] We further note that counsel was given an incorrect address for Fletcher, the witness who testified at trial that Fortson had told him Hamilton had shot Hynes. Fletcher was not at the address listed because he had been arrested on an unrelated charge. At the October 17 hearing defense counsel discovered that Fletcher was incarcerated but was not told in which jail he was being held. Counsel therefore had no opportunity to interview him prior to his testimony. After Fletcher's testimony, counsel renewed his motion for separate counsel because of the serious nature of the conflict of interest that Fletcher's testimony posed.

We find that the reading of a file for an unrelated purpose is inadequate exploration of the possibility of conflict. Further, by asking defense counsel to disclose trial strategy in open court, the trial court improperly placed counsel in a situation where in order to adequately respond he would have had to disclose client confidences, thereby breaching attorney/client confidentiality. As the Supreme Court stated in *Holloway*, "[O]ur holding [does not] preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interest without *improperly* requiring disclosure of the confidential communications of the client." 435 U.S. at 487, 98 S.Ct. at 1179 (emphasis added). We therefore hold that the trial court inadequately investigated the possibility of conflict in this case.

C. *Conclusion*

After review of the record, we conclude that Hamilton timely objected to joint representation because it involved a conflict of interest and that the trial court failed adequately to explore the possibility of conflict of interest as required by *Holloway*. Hamilton's Sixth and Fourteenth Amendment rights of effective assistance of counsel were violated and reversal is automatic.[6]

---

[6] Even under the more restrictive *Cuyler* standard, Hamilton would be entitled to a reversal of his conviction because there was an actual conflict of interest that adversely impacted his counsel's performance. If separately represented, Hamilton might have been able to object to Fletcher's testimony as inadmissible hearsay against him. Because Hamilton and Fortson were jointly represented, however, counsel failed to object because it was admissible against Fortson and to do otherwise

We conditionally grant Hamilton's petition for writ of habeas corpus. Accordingly, the writ shall issue unless, within 90 days from the date of this opinion, the state has commenced proceedings to retry the petitioner.

---

might have prejudiced Fortson's defense. Counsel also failed to cross-examine Fortson on whether he might have made the statement to Fletcher so as to avoid an intentional murder charge.

In addition, though both defendants utilized an alibi defense, Hamilton, if separately represented, could have exploited Moore's shaky identification of him. At the physical lineup Moore immediately picked Fortson out. Her identification of Hamilton took considerably more time. She initially provided a significantly more detailed description of the robber later identified as Fortson. In describing the robber, later identified as Hamilton, she was only able to describe general features because she had only been able to see the second robber for a brief instance. We therefore find that the *Cuyler* standard has been met in this case.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8023

HENRY HAMILTON,

Petitioner-Appellant,

versus

PAUL FORD, Warden, Jack T. Rutledge Correctional Institute,

Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

(Filed Oct. 21, 1991)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion August 21, 11th Cir., 1992, ___ F.2d ___).

Before: BIRCH, Circuit Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

No. 92-1232

Supreme Court, U.S.
FILED
FEB 17 1993
OFFICE OF THE CL...

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

J. PAUL FORD, Warden,

Petitioner,

v.

HENRY HAMILTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

SUBMITTED BY:

Henry Hamilton

Of Counsel:

Glen M. Darbyshire
HUNTER, MACLEAN, EXLEY
& DUNN, P.C.
Post Office Box 9848
Savannah, Georgia 31412-0048
(912) 236-0261

February 17, 1993

No. 92-1232

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

J. PAUL FORD, Warden,

Petitioner,

v.

HENRY HAMILTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

SUBMITTED BY:

Henry Hamilton

Of Counsel:

Glen M. Darbyshire
HUNTER, MACLEAN, EXLEY
& DUNN, P.C.
Post Office Box 9848
Savannah, Georgia 31412-0048
(912) 236-0261

February 17, 1993

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

STATEMENT OF THE CASE..... 1

ARGUMENT AND CITATIONS OF AUTHORITY

I. DETERMINING WHETHER JOINT REPRESENTATION WAS IMPROPERLY REQUIRED OVER TIMELY OBJECTION PRESENTS A FACT-SPECIFIC INQUIRY, AND THEREFORE ANY ATTEMPT TO FORMULATE A CONSTITUTIONALLY MANDATED TEST FOR EVERY CASE WOULD BE INAPPROPRIATE, IF NOT IMPOSSIBLE..... 14

II. EVEN IF THE COURT HELD THAT THE ACTUAL CONFLICT/ADVERSE IMPACT TEST MUST BE APPLIED IN EVERY CASE TO DETERMINE IF JOINT REPRESENTATION WAS IMPROPERLY REQUIRED, THE RESULT IN THIS CASE WOULD NOT DIFFER..... 18

III. WHETHER A COURT OF APPEALS MAY CONDITIONALLY GRANT A PETITION FOR WRIT OF HABEAS CORPUS AND REQUIRE THE COMMENCEMENT OF A RETRIAL WITHIN 90 DAYS OF THE DATE OF THE COURT'S OPINION PRESENTS AN ISSUE NOT DECIDED IN THE COURT BELOW..... 22

CONCLUSION..... 24

TABLE OF AUTHORITIES

Cuyler v. Sullivan, 446 U.S. 335 (1980)..... 14, 18, 19, 20

Glasser v. United States, 315 U.S. 60 (1941)..... 14, 20

Holloway v. Arkansas, 435 U.S. 475 (1978)..... 14, 15, 16

Duncan v Alabama, 881 F.2d 1013 (11th Cir. 1989)..... 19

Gray v. Estelle, 616 F.2d 801 (5th Dir. 1980)..... 22

Hamilton v. State, 255 Ga. 468, 339 S.E.2d 707 (1986)..... 7

STATEMENT OF THE CASE

The murder of Stephen Hynes occurred on May 28, 1983. Respondent was indicted for the murder on July 12, 1983. Specifically, the indictment charged respondent and his cousin, Michael Fortson, with one count of malice murder and two counts of attempted robbery of Hynes and his fiancee, Catherine Moore. The indictment listed 23 witnesses. It did not list four witnesses whose testimony provided a critical link between respondent and the murder of Stephen Hynes. These witnesses were: Calvin Fletcher, Gwendolyn Cade, James Tate, and Tony Alphabet.[1]

The trial court appointed attorney James W. Lewis to represent both Fortson and respondent. During a pretrial hearing on October 17, 1983, the court ordered the prosecutor, Michael Whaley, to produce a list of potential witnesses and persons having knowledge about the case, along with the correct address for each. The court further ordered Whaley to provide Lewis with a list of the witnesses he intended to call at least by the Thursday before the scheduled first day of trial, Monday, November 14, 1983.

Also during the pretrial hearing, the court denied a motion for severance. The motion included among its

---

[1]The opinion of the Court of Appeals below addressed only the first three of these witnesses and erroneously spelled Cade as "Cates." (See Petition for Writ of Certiorari, App. 4-5).

several grounds the possibility that the State would seek to introduce evidence against one defendant which might not be admissible against the other, and the conflict that would arise if one defendant elected to testify while the other did not. The trial court reasoned that as long as the State intended to introduce eye-witness testimony placing both defendants at the scene of the alleged crime, then separate trials were not warranted. The court did not otherwise inquire as to the details of defense and acknowledged that it did not know of any evidence which would render the defenses of Fortson and respondent antagonistic. Only the prosecutor, Whaley, could have known at that time if any of the then unnamed witnesses would testify to matters which would create a conflict between the defendants.

Four days after the pretrial hearing, Whaley provided a list of potential witnesses containing 144 names and numerous incomplete addresses. Included in this list were the 23 witnesses previously identified in the indictment, as well as the four witnesses who linked respondent to the murder: Fletcher, Cade, Tate and Alphabet. Whaley did not disclose the list of actual witnesses until the weekend before trial. At no time does the record reflect that he disclosed the substance of their expected testimony.

On the morning of the first day of trial, Lewis moved to renew his motion for severance or for appointment of separate counsel to represent one of the defendants. Lewis

explained that his investigation over the preceding weekend had led him to conclude that, unless the defendants were tried separately, matters would arise which would preclude his defense of one defendant without suggesting the other defendant's guilt. Lewis did not give details as to the basis for his conclusion, and the Court did not inquire. Rather, the court again reasoned that if each defendant intended to present a separate alibi defense, then their positions were not antagonistic, and as long as Whaley introduced evidence that both defendants were present at the scene of the crime, no severance was warranted. With specific reference to evidence of prior similar transactions involving one defendant and not the other, the trial court saw no conflict, for Lewis would have to attempt to disprove or rebut each transaction.

Lewis then argued that there were other problems of which the court was not aware because it did not have the benefit of the same information he had obtained over the weekend. The court's response to this argument precluded any detailed explanation of those problems:

> COURT: I hope I don't because then I might be in the position of not being totally fair. No. I try my best not to have the same information counselor. I want to look at it fresh like the jury does.
>
> LEWIS: I don't know anything to do except to come here this morning and tell this court I do not believe ethically, morally, that I should represent both of these men before the same jury.

(T. 14). Despite these representations, after an extended discussion regarding the State's production of exculpatory material and other motions, the trial court refused to grant a continuance and denied the request for appointment of separate counsel.

The only eye-witness testimony describing the murder of Stephen Hynes came from Catherine Moore, and her identification of the defendants was therefore critical evidence. Moore testified that two assailants were involved, although the circumstances were such that her ability to observe and later identify each of them differed dramatically. On the night of the shooting, May 28, 1983, Moore could only describe one assailant, Fortson. Several days later, she failed to identify positively either Fortson or respondent from a photographic array. However, on June 29, 1983, Moore attended a corporal line-up, at which she immediately identified Fortson, the second of eight subjects in the line. Upon further viewing of the participants in that line-up, Moore also identified respondent, who was number six, although one observer testified that Moore may also have mentioned number eight.

Other evidence tending to identify respondent as Fortson's accomplice consisted of testimony from witnesses regarding a number of prior similar transactions. In particular, William Hayes testified that he and his wife were the victims of a robbery earlier in the same evening in which Hynes was killed. Although the two Hayes

assailants had handkerchiefs over their faces from the nose down, Hayes positively identified Fortson at the same corporal line-up Moore attended on June 29. However, Hayes did not identify respondent, and instead identified subject number eight. Nevertheless, at trial Hayes identified both Fortson and respondent as having committed the robbery. On cross-examination of Hayes, Lewis pointed out that Hayes had not identified respondent in the June 29 line-up, but he did not inquire further as to the identity or appearance of subject number eight or suggest the possibility that Fortson had committed the robbery along with someone other than respondent.

In the Hayes robbery, only one of the assailants had carried a gun. Catherine Moore similarly recalled seeing only one gun -- in the hand of Fortson, the first man she observed during the incident and the suspect she was best able to identify at the line-up. Later testimony from a forensic expert supported a conclusion that bullets had been fired from two different weapons, and Whaley ultimately argued before the jury that both Fortson and respondent had fired a shot killing Stephen Hynes. However, the only evidence specifically linking respondent to a gun appeared in the testimony of Calvin Fletcher, Gwendolyn Cade, James Tate and Tony Alphabet.

Fletcher testified that soon after the Hynes murder he learned through a relative of Fortson that Fortson may have been involved in the incident and that Fortson himself had

been shot in the leg. Seeking a $10,000 reward, Fletcher contacted police investigators and told them his belief that Fortson had been involved. Fletcher further testified that he later had two discussions with Fortson in which Fortson admitted being present along with respondent when Hynes was killed. According to Fletcher, Fortson stated that "Henry" -- implying Henry Hamilton, the respondent -- "shot him [Hynes] in the back twice." (T. 728, 730). This was the only evidence linking respondent by name to the possession of a weapon at the scene of the crime, and it was the only evidence specifically blaming respondent for the shooting of Stephen Hynes. Lewis did not object on respondent's behalf to Fortson's out-of-court statements on the ground that they were inadmissible hearsay.

Comparable statements were later introduced through Cade and Tate, who claimed they saw Fortson on the weekend of the shooting and Fortson had said that "his cousin had shot him [Fortson]" in the leg. (T. 790, 803).[2] Near the end of the trial, as part of the State's rebuttal evidence, Alphabet likewise testified that Fortson said "he had been shot by his cousin." (T. 1392). Notably, the

---

[2]The opinion of the Court of Appeals below focused on the double hearsay testimony of Cade and Tate relating statements by Yolanda Cudger, to which Lewis effectively objected. (See Petition for Writ of Certiorari, App. 5). However, with prompting by the prosecutor, both Cade and Tate testified that Fortson told each of them directly that respondent had shot Fortson in the leg. (T. 790, 803).

testimony of Cade, Tate and Alphabet did not necessarily place respondent at the scene of the Hynes shooting, as did Fletcher's testimony, but merely suggested that a cousin (perhaps not even respondent) had shot Fortson. Lewis did not cross-examine any of these witnesses on any of these points, nor did he object to their testimony of statements by Fortson as inadmissible hearsay.

The testimony of Fletcher, Cade, Tate and Alphabet was extremely important to the State's case against respondent, for without it the only evidence suggesting that respondent had been present when Hynes was killed was Moore's less than immediate identification of respondent at the June 29 line-up and the even less conclusive evidence of similar transactions.[3] In addition, while the forensic expert had identified bullets from two weapons, Moore had seen only one gun, and she identified Fortson as having possessed it. The testimony of Fletcher, Cade, Tate and Alphabet therefore offered critical support for an inference that respondent had been present and armed when Hynes was killed.

---

[3]On direct appeal, the Georgia Supreme Court stated that respondent's involvement had also been shown through physical evidence, such as blood and hair samples found at the scene of the crime. Hamilton v. State, 255 Ga. 468, 469, 339 S.E.2d 707 (1986). The opinion of the Court of Appeals below repeated this statement. (See Petition for Writ of Certiorari, App. 2, n.1). In fact, although these samples were taken and studied by the State's forensic laboratory, no such evidence was introduced.

Following the testimony of these witnesses, Lewis again moved "for severance for counsel for these two defendants," arguing as follows:

> It has been a concern of mine from the beginning of the case, after we had investigated what we thought might be the evidence, and now that the State has put on its case, in view of these blurted out statements by Gwendolyn Cade and James Tate and Calvin Fletcher, that Mike Fortson told me Henry shot him; Mike Fortson told me that Henry shot Mr. Hynes; there is simply no way that one attorney can represent both these defendants properly.

(T. 871). Lewis further pointed out the conflict that would arise if respondent wanted him to cross-examine Fortson, "because it appears that the entire State's case against [respondent] is piggy backed on these alleged statements made by Mr. Fortson." (T. 871). Lewis then stated that respondent "has expressed a desire for separate counsel," and suggested that a public defender be appointed to represent respondent, even though it would require a mistrial and continuance so that the public defender could have time to investigate the case. (T. 871-72).

In response, Whaley argued that in a pretrial hearing (of which there is no transcript) both defendants had waived any conflicts of interest. He further noted that Lewis had failed to raise a hearsay objection, and that if an objection had been made Whaley would have argued that the testimony was admissible under a conspiracy theory (even though no conspiracy had been alleged). Lewis replied that if the record reflected a prior waiver of the right to separate counsel, then the waiver could not have

been with knowledge of the actual conflicts that had arisen at trial, and he explained that he had not objected to the hearsay testimony because, even if the objection were sustained, the testimony had been given and no amount of instruction to the jury would remove the harm.

In response to these arguments, the trial court stated that while it could not presume the defendants had knowledge of everything the State would introduce, it seemed logical to assume that the testimony which they now claimed required severance and separate counsel was information that they had known when they agreed to joint representation. The court further observed that the names of these witnesses were on the list provided to Lewis "during the pretrial stages of this case when [the defendants] were making the waivers and were making the statements they wanted one counsel to represent both of them."[4] (T. 875). The court concluded that in any event the defendants had not been harmed, regardless of whether they had known about this aspect of the State's case against them. Nonetheless, while stating that it had no intention of granting a mistrial and appointing

---

[4]However, unless the "waivers" and "statements" by the defendants occurred after October 21, 1983, when the list of 144 names (including Fletcher, Cade, Tate and Alphabet) was first made available, the trial court was mistaken on this point. As noted previously, no record of a waiver hearing has been found, and it is impossible to know when such a hearing may have been held.

independent counsel, the court ruled that should a need arise to cross-examine the defendants, then it would ask a public defender to consult with one or both of them.

Lewis argued in response to this ruling that the court was not correct to assume the defendants had known in advance of the testimony introduced through these critical witnesses, noting in particular Cade's testimony that she had refused to talk to him at the instruction of the State's investigator, and it was not until the morning before Fletcher's testimony that Lewis had been permitted an attempt to interview him.[5] Lewis argued that if he had been able to interview these witnesses without interference by the State, then the defendants might have been in a position to make a fully informed waiver of the right to separate counsel.

At this point, the trial court again mentioned the possibility of providing a public defender -- Russell Meyer -- to consult with either defendant in the event the other elected to take the stand and testify:

> To that extent and to that extent only, I would consider the possibility of asking Mr.

---

[5]Whaley had stated at the outset of the trial that when he gave Lewis the street address for Fletcher, Fletcher was not in jail. However, the address apparently was not given to Lewis until October 21, 1983, and separate testimony from the investigating officer indicates that Fletcher was in jail at least by June 19, 1983. Thus, Fletcher apparently had been in prison and not at the street address furnished by Whaley. (See Petition for Writ of Certiorari, App. 14, n.5).

> Meyer or somebody from the public defender's office to sit -- in the light of what they can cull from what Mr. Lewis may say, to be able to advise, as best they possibly can, one of these defendants as to whether they might take the stand, whether they might not take the stand. If they do take the stand, what kind of cross-examination they might be subject to by both the State and Mr. Lewis if it comes to that; if their positions become totally contradictory.

(T. 878). Thus, the trial court ultimately did consider the possibility that one defendant might be subject to cross-examination by both the State and Lewis, but it clearly did not recognize a need for separate counsel unless the positions of the defendants became "totally contradictory."

Purely as a cautionary matter, therefore, the trial court requested Meyer to join the proceedings, even though he had only limited knowledge of the case based on newspaper accounts and general courthouse gossip. In fact, it was not until after the State had rested its case and the defense had called several witnesses that Meyer appeared. He was instructed to assist whichever defendant Lewis felt might have a problem in the event one chose to testify.

After introducing a series of witnesses for the defense, Lewis called Fortson to the stand. Fortson testified consistent with the testimony of other witnesses in support of his alibi defense. Neither Lewis nor Meyer attempted to cross-examine Fortson on respondent's behalf.

Following Fortson's testimony, the trial court asked Lewis whether he intended to put respondent on the stand.

When Lewis announced that respondent would testify, the court asked whether it was still necessary that Meyer remain in the courtroom to assist. Lewis responded that Meyer's presence had not solved the problem, but the court replied that the issue would be one for appeal. The court again explained that the reason Meyer had been requested to appear was so that, if Lewis decided not to call respondent, then respondent could still consult with another attorney regarding whether to testify. Since Lewis had indicated that respondent would testify, the court saw no further reason to have Meyer present. Lewis then made it clear that respondent wanted to testify and wanted to consult with Lewis in the absence of severance. Meyer was excused, and respondent took the stand and testified to an alibi defense.

In closing arguments before the jury, with reference to the June 29 cprporal line-up and Moore's identification of the defendants, Lewis stated that everything he said was on behalf of both defendants, but that he did not intend to lump them together and he was not acknowledging anything on behalf of either of them by grouping them together. Lewis did not, however, emphasize the different degrees of certainty in Moore's identification of the defendants, or suggest that respondent might not have been Fortson's accomplice. By contrast, Whaley argued in closing that Moore had positively identified both defendants, that both

had carried guns, and that both had shot Stephen Hynes. The jury found both defendants guilty of felony murder.

ARGUMENT AND CITATIONS OF AUTHORITY

I. DETERMINING WHETHER JOINT REPRESENTATION WAS IMPROPERLY REQUIRED OVER TIMELY OBJECTION PRESENTS A FACT-SPECIFIC INQUIRY, AND THEREFORE ANY ATTEMPT TO FORMULATE A CONSTITUTIONALLY MANDATED TEST FOR EVERY CASE WOULD BE INAPPROPRIATE, IF NOT IMPOSSIBLE.

Because of conflicts of interest in representing both Fortson and respondent, Lewis failed to object to the hearsay testimony of Fletcher, Cade, Tate and Alphabet as to statements Fortson made to each of them implicating respondent in the murder of Stephen Hynes. Moreover, when Fortson took the stand to testify in his own defense, Lewis was unable both to conduct direct examination on Fortson's behalf and then to cross-examine Fortson on respondent's behalf. These precise conflicts were addressed by this Court in Glasser v. United States, 315 U.S. 60 (1941), and Holloway v. Arkansas, 435 U.S. 475 (1978), respectively. In both cases, prejudice to the convicted defendant was presumed and the reversal of his conviction was automatic. See Glasser, 315 U.S. at 73, 75-76; Holloway, 435 U.S. at 477-78, 488-91. The Court in Cuyler v. Sullivan, 446 U.S. 335 (1980), did not overrule either of those decisions, and the arguments set forth in the present petition do not request such a result. Unchallenged precedent therefore fully supports the decision of the Court of Appeals below, and the petition for writ of certiorari should be denied.

Nonetheless, in the first question presented, petitioner requests this Court to define a test for determining whether joint representation has been improperly required, quoting the Court's description in Holloway of its holding in Glasser that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." Holloway, 435 U.S. at 488. In other words, petitioner is requesting that the Court define a specific inquiry for state courts to follow in future cases in order to satisfy the Holloway duty to take adequate steps to ascertain whether the risk of conflicts of interests between jointly represented defendants warrants the appointment of separate counsel. Id. at 484.

Such a test, however, is by definition fact-specific. The types of possible conflicts are numerous, and no litany of warnings or questions prescribed by this Court will necessarily ensure conflict-free representation in every case. State courts and lower federal courts are fully capable of reviewing claims for ineffective assistance based on alleged conflicts in joint representation, and petitioner has identified no split of authority among the rulings by these courts to date. Simply put, petitioner has demonstrated no compelling need for this Court to define a Constitutional test to apply in every case for determining whether joint representation is improper.

Yet even if this Court were to undertake to define the scope of inquiry required in every case to assess the risks of conflict in joint representation, the result in the present case surely would not differ because the trial court refused to conduct any meaningful inquiry. In fact, the trial court completely disclaimed any desire to learn the factual basis for the conflict of interest Lewis asserted on the first day of trial. The court insisted that it "look at it fresh like the jury does." (T. 14).

By then, however, the precise conflicts previously recognized by this Court in Glasser and Holloway were all too apparent despite the trial court's decidedly narrow view of the matter. The trial court saw no conflict so long as Fortson and respondent introduced separate alibi defenses which themselves did not conflict. However, the existence of separate alibi defenses does not preclude a finding that one defendant can benefit from suggesting that the other defendant is lying. This strategy may even become an absolute necessity where testimony has been admitted describing the other defendant's out-of-court statement that the first defendant had committed the crime. Respondent submits that conflicts of interest such as these raise issues far more complex and encompassing than simply whether alibi defenses are factually inconsistent. This was the precise lesson of Holloway, in which each defendant offered a separate alibi defense. 435 U.S. at 486.

Moreover, even if the trial court had conducted an inquiry on the first day of trial in this case, it is not likely that the actual conflicts which later arose from the testimony of Fletcher, Cade, Tate and Alphabet would have been identified. While petitioner suggests that the trial court viewed the motion for separate counsel as a "stalling tactic," (Petition for Writ of Certiorari, p. 8), nothing in the record suggests that Lewis was not being entirely candid when he represented to the court that a conflict existed and that he had only learned of the conflict during the weekend before trial. Indeed, if blame is to be placed on any participant in the proceeding for the problem of having to deal with conflicts of interests on the first day of trial, that blame should be laid at the feet of the prosecutor. Whaley must have known long before trial that Fletcher, Cade, Tate and Alphabet would testify and would relate Fortson's out-of-court statements implicating respondent. Yet Whaley never notified the trial court or Lewis of the specific conflict this testimony would create.

To the contrary, it appears that Whaley consistently resisted divulging this information. The State failed to provide Lewis with a correct address for Fletcher following his imprisonment and refused to allow Lewis to interview Fletcher either before trial or outside the presence of Whaley and the State's investigator. Lewis therefore did not learn of Fletcher's testimony until Fletcher actually

took the stand. Moreover, the State should be presumed accountable for Lewis' inability to discover the substance of Cade's testimony before trial, for she followed the specific instruction of the State's investigator and refused to discuss the case with anyone, including Lewis. Accordingly, the Court of Appeals below specifically found that any delay in the objection by Lewis to joint representation was caused by Whaley's delay in providing evidence to the defense and/or the inadequacy of the information provided. (Petition for Writ of Certiorari, App. 14).

For these reasons, respondent submits that the present case does not warrant further review in this Court. No attempt to prescribe a Constitutionally mandated inquiry will cover the possibilities for conflict in every case, and whatever inquiry might be required in future cases would not alter the result in the present case. Therefore the petition for writ of certiorari should be denied.

II. EVEN IF THE COURT HELD THAT THE ACTUAL CONFLICT/ADVERSE IMPACT TEST MUST BE APPLIED IN EVERY CASE TO DETERMINE IF JOINT REPRESENTATION WAS IMPROPERLY REQUIRED, THE RESULT IN THIS CASE WOULD NOT DIFFER.

As an alternative question presented for review by this Court, the petition suggests that the actual conflict/adverse impact test announced in Cuyler v. Sullivan, 446 U.S. 335 (1980), should apply to all cases of joint representation and not simply to those in which no

objection was raised at trial. The Court of Appeals below has interpreted Cuyler to apply only where no objection was raised, (Petition for Writ of Certiorari, App. 10); see Duncan v. Alabama, 881 F.2d 1013, 1017 n.5 (11th Cir. 1989), and petitioner has located no contrary decision creating a split of authority as to the intended application of the Cuyler test.

Nevertheless, even if the Cuyler test were held to apply to every case, respondent submits that the test is readily satisfied here. Indeed, respondent notes that the Court in Cuyler cited Glasser as an example of an actual conflict of interest which adversely affected trial counsel's performance. See Cuyler, 446 U.S. at 348-49. The Cuyler Court recalled that the defense counsel in Glasser failed to object to hearsay testimony from a State witness that linked Glasser with the crime, because of a desire to diminish the jury's perception of a co-defendant's guilt. Id.

Similarly, Lewis did not object on behalf of respondent to Fletcher's testimony that Fortson had stated respondent killed Stephen Hynes and accidentally shot Fortson. This testimony was not objectionable as to Fortson, since it was his own statement and was an admission against his interest, but the testimony was clearly objectionable as to respondent. Yet if Lewis had objected only on respondent's behalf, he would have risked leaving the jury with the impression that the testimony was

true as to Fortson. This is precisely the problem addressed in Glasser. See 315 U.S. at 73-74. Although Fortson's alleged statement was inadmissible against respondent, it was the only evidence linking respondent by name to the possession of a weapon at the scene of the crime or to the actual shooting of Stephen Hynes.

In addition, Lewis did not attempt to cross-examine Fletcher as to the truth of Fortson's statement or possible motives for Fortson or Fletcher to lie on this point. Nor could Lewis call Fortson as a witness and cross-examine him on these matters without creating a conflict. Lewis did not explore the possibility that Fortson feared an arrest on intentional murder charges and sought to blame someone else for the actual shooting. Lewis' inability to cross-examine Fortson on respondent's behalf represents the same conflict of interest recognized in Holloway, and respondent submits that it, too, satisfies even the Cuyler test for ineffective assistance of counsel. See Cuyler, 446 U.S. at 349-50.

Moreover, Lewis did not attempt to cross-examine Cade, Tate or Alphabet regarding their testimony that Fortson had said he was shot in the leg by his cousin. Lewis did not suggest on respondent's behalf that some other cousin had accompanied Fortson during the robbery attempt and Fortson was attempting to protect that person while implicating respondent. Nor did Lewis suggest that respondent may have justifiably shot Fortson in an unrelated incident.

Further, Lewis failed to emphasize during his cross-examination of Catherine Moore the distinct differences of conviction in her identifications of Fortson and respondent. At a pretrial hearing on the defendants' motion to suppress evidence of Moore's identifications during the June 29 corporal line-up, Moore had testified in considerable detail as to her basis for identifying Fortson, including references to several specific facial features of Fortson. She was notably less specific in explaining her basis for identifying respondent. Lewis did not suggest during his cross-examination of Moore at trial that while Fortson may well have been involved in the crime, respondent had not been. Similarly, Lewis did not emphasize during his cross-examination of Hayes, the victim of an earlier robbery on the night that Hynes was killed, that Hayes had also positively identified Fortson during the June 29 line-up but had failed to identify respondent and had identified someone else. Lewis did not attempt to suggest that Hayes' identification of respondent at trial might simply have been based on the fact that he was convinced Fortson had committed the crime in the company of another assailant. Finally, in closing argument Lewis did not emphasize the differing degrees of certainty in this identification testimony, nor did he otherwise suggest that while Fortson may have committed the alleged crime, reasonable doubts remained as to respondent's involvement.

For these reasons, even under the Cuyler standard respondent has demonstrated that conflicts of interest existed which adversely affected the performance of his trial counsel. Indeed, as an alternative holding, the Court of Appeals below specifically found that the Cuyler standard was satisfied in this case. (Petition for Writ of Certiorari, at p. 15, n.6). Respondent submits that this finding was correct, and therefore the petition for writ of certiorari should be denied.

III. WHETHER A COURT OF APPEALS MAY CONDITIONALLY GRANT A PETITION FOR WRIT OF HABEAS CORPUS AND REQUIRE THE COMMENCEMENT OF A RETRIAL WITHIN 90 DAYS OF THE DATE OF THE COURT'S OPINION PRESENTS AN ISSUE NOT DECIDED IN THE COURT BELOW.

Respondent argued before the Court of Appeals below that his petition for writ of habeas corpus should be granted and he should be released unless the State of Georgia saw fit to retry him within a reasonable period of time, not to exceed 90 days. In support of this request, respondent cited Gray v. Estelle, 616 F.2d 801, 805 (5th Cir. 1980), in which the Court of Appeals issued a ruling requiring the State of Texas to retry a petitioner within 90 days of the issuance of the court's mandate. In the present case, the Court of Appeals provided that the 90-day period would begin running from the date of its opinion.

Petitioner's motion to stay the running of that 90-day period was not ruled upon by the Court of Appeals below. Instead, petitioner delayed issuance of that court's

mandate by filing a motion for rehearing and suggestion of rehearing en banc. Petitioner then sought and obtained a stay of the court's mandate through January 20, 1993, five months after the date of the opinion. Upon the filing of the petition for writ of certiorari, that stay extended automatically until this Court rules on the petition.

Because the mandate of the Court of Appeals has not yet issued, jurisdiction over the case has not been remanded to the district court and no order releasing respondent has been entered. In the interim, the Court of Appeals may or may not rule on the motion to stay the running of the 90-day retrial period (although respondent notes that the period has already expired). Moreover, it may be that on remand following this Court's denial of the petition for writ of certiorari the State will forego a retrial altogether. For these reasons, respondent submits that the legal consequence of the State's failure to retry respondent within 90 days of the opinion of the Court of Appeals has not been decided below and may never become an issue in this case. Therefore, granting certiorari to decide the third question presented in the petition would be premature.

CONCLUSION

Respondent respectfully submits that the petition for writ of certiorari should be denied with respect to each question presented.

Henry Hamilton

Of Counsel:

Glen M. Darbyshire
HUNTER, MACLEAN, EXLEY &
DUNN, P.C.
Post Office Box 9848
Savannah, Georgia 31412-0048
(912) 236-0261